

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DIANE M. HECKMAN,

Plaintiff/Counter-Defendant-  
Appellant,

v

ARTHUR D. DYBOWSKI and VIRGINIA R.  
DYBOWSKI,

Defendants/Counter-Plaintiffs-  
Appellees.

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UNPUBLISHED

September 21, 2006

No. 268643

Oakland Circuit Court

LC No. 2004-061094-CZ

Before: Cavanagh, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition to defendants. This case arises from a property boundary line dispute. We reverse and remand for proceedings consistent with this opinion.

At issue in this case is the boundary line between lakefront lots seven and eight as identified on the Grampian Heights Subdivision Number Two plat map. Plaintiff gained ownership of lot eight, which her parents had previously owned since approximately 1950, in 2003. In 1993, defendants purchased lots six and seven, which had been previously owned by Denny and Elsie Berns since at least 1960. The former owners of the lots at issue are all deceased. In 2004, plaintiff was preparing to build a home on her lot when she discovered that the access point for defendants' septic tank encroached on her property, according to a new survey. Plaintiff subsequently filed suit, seeking removal of the septic tank, claiming damages as a result of defendants having removed and trimmed trees in the disputed area, and asserting a claim related to an alleged violation of an Oakland Township zoning ordinance. An amended counterclaim filed by defendants seeks to quiet title to the disputed area in their favor under the doctrines of acquiescence and adverse possession.

Plaintiff moved for summary disposition on defendants' counterclaims, and defendants moved for summary disposition on their own claims and on plaintiff's claims. The trial court ruled that defendants were entitled to the disputed property, as marked by a line of trees and survey irons and in accord with the subdivision plat, under the theory of acquiescence. The trial court further ruled that plaintiff did not have standing to enforce the zoning ordinance.

On appeal, plaintiff only challenges the court's ruling concerning the boundary line between lots seven and eight. Although the parties moved for summary disposition under MCR 2.116(C)(7), (8), and (10), it is apparent that the trial court based its challenged decision on (C)(10), because the court considered information not contained in the pleadings as part of its analysis.<sup>1</sup> A trial court's ruling on a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is appropriate under MCR 2.116(C)(10) when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." In ruling on a motion for summary disposition under MCR 2.116(C)(10), "a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the non-moving party." *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005).

The doctrine of acquiescence arose to promote peaceful resolutions to boundary disputes. *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001). In this case, defendants asserted that they had title to the disputed area based on acquiescence for the statutory period. Acquiescence based on the passage of the statutory period may be established even if no controversy existed regarding the correct boundary. *Sackett v Atyeo*, 217 Mich App 676, 681; 552 NW2d 536 (1996).

The law of acquiescence is concerned with a specific application of the statute of limitations to cases of adjoining property owners who are mistaken about where the line between their property is. Adjoining property owners may treat a boundary line, typically a fence, as the property line. If the boundary line is not the recorded property line, this results in one property owner possessing what is actually the other property owner's land. Regardless of the innocent nature of this mistake, the property owner whose land is being possessed by another would have a cause of action against the other property owner to recover possession of the land. After fifteen years, the period for bringing an action would expire. The result is that the property owner of record would no longer be able to enforce his title, and the other property owner would have title by virtue of his possession of the land. [*Kipka v Fountain*, 198 Mich App 435, 438-439; 499 NW2d 363 (1993).]

"The acquiescence of predecessors in title can be tacked onto that of the parties in order to establish the mandated period of fifteen years." *Killips, supra* at 260.

In this case, the evidence indicates that an area of property several feet wide with natural growth and additional plantings of trees and myrtle has approximately separated the properties from defendants' house north to the traverse line, that the properties are both grassy near the lakeshore with no identifiable separation other than some tires placed west of plaintiff's dock,

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<sup>1</sup> Defendants' (C)(7) motion concerned plaintiff's standing to raise the ordinance violation claim. The trial court's ruling on that issue has not been challenged on appeal.

and that retaining walls, built by defendants' predecessors with help from plaintiff's predecessors, seem to separate the properties on the south side of defendants' house.

The disputed area includes a line of spruce trees. However, the parties dispute who planted the spruce and when, and they dispute whether this line of trees has always been a "line" or whether recent pruning and tree removal has made the tree line a more distinctive boundary.<sup>2</sup> Evidence was also presented that the trees were planted for privacy and not specifically to mark a boundary. Further, defendants' expert admitted that the tree line did not exactly follow the property line as he measured it. In addition, Linda Mantle, the Berns' granddaughter who lived at the home from 1960 to 1971, testified that her family mowed into the disputed area when the spruce trees were small, up to the point where a tire was placed near the lakeshore. This tire appears to be just to the east of the tree line and to the west of plaintiff's dock. Evidence was also presented that plaintiff and her siblings and their predecessors used the disputed area to gather wood and that their family buried three dogs in the disputed area. Apparently, older survey stakes and pipes of unclear origin are also located in the disputed area, but according to Mantle, these stakes did not follow a clear line. Plaintiff's brother testified that he had believed these stakes marked the boundary line between the lots, but he further testified that he nevertheless used the disputed area.

In this case, the trial court did not find that the parties or their predecessors had acquiesced in a new property line following an initial mistake about where the boundary ran. Rather, the trial court granted title by acquiescence under the apparent belief that the allegedly acquiesced-in line corresponded with the recorded plat. We are unclear about how the court intended to rule, because the court's ruling is self-contradictory in that if the plat line was being followed, then the equitable remedy of title by acquiescence was unnecessary. Further, the issue of where the plat line runs was clearly disputed in the trial court. The parties' experts disagreed about where the recorded line fell and how the plat should be interpreted, and both admitted that the plat contained material errors.

Considering the evidence in the light most favorable to plaintiff, we conclude that the trial court erred by failing to find a genuine issue of material fact. While the evidence suggests that the parties and their predecessors in title may have treated the tree line and retaining walls as the boundary line between the properties, evidence was presented that all the parties and their predecessors used the disputed area surrounding the tree line. The evidence of mutual use leaves a material issue in dispute, i.e., whether the parties' predecessors mistakenly treated the tree line as a boundary line. Because evidence was presented that the parties and their predecessors did not treat the tree line as the boundary line for the statutory period, summary disposition in defendants' favor on the issue of acquiescence was not appropriate. Also, because the physical features of the boundary area suggest that plaintiff's predecessors may have acquiesced in a boundary running along the tree line, and because the evidence supporting plaintiff's assertion

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<sup>2</sup> Defendants assert that plaintiff's contention that she saw her mother planting the spruce trees is not credible. However, a court may not assess credibility in ruling on a motion for summary judgment. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

that she and her predecessors treated the disputed area as their own is not dispositive, we conclude that open issues remain and that the acquiescence claim must be remanded for trial.

Plaintiff contends that summary disposition should be granted in her favor on defendants' claims for title by acquiescence and adverse possession because there is no admissible evidence concerning how the boundary was treated for any particular 15-year period. Plaintiff indicates that neither Mantle nor defendants lived at the property for 15 years and that Mantle only visited infrequently after she moved away from the property. However, according to Mantle, she continued to speak regularly with her grandparents from 1971 to 1977, and thereafter regularly visited her grandmother and helped to maintain the home "inside and outside" until 1993. Thus, Mantle regularly visited the home and helped to maintain it for the statutory period. Accordingly, we find that a reasonable fact-finder could conclude that Mantle had sufficient knowledge of how the boundary line was treated for the statutory period to establish that defendants are entitled to title by acquiescence or adverse possession.

The trial court denied plaintiff's motion for summary disposition on defendants' claim of adverse possession on the basis that defendants proved they had title to the disputed property by showing acquiescence. Accordingly, the trial court failed to address the merits of the adverse possession issue. On appeal, plaintiff's only assertion that she was entitled to summary disposition on defendants' claim of adverse possession is related to the alleged insufficiency of the evidence concerning how the property was treated during the pertinent statutory-period, as discussed above. Because we reject this argument, and because plaintiff has not otherwise established that the trial court erred in denying her motion for summary disposition, we conclude that this issue must also be remanded for further appropriate proceedings.

We reverse and remand this case to the trial court for further appropriate proceedings consistent with this opinion to determine where the recorded plat line falls, how the parties and their predecessors treated the boundary, whether the wrong line was treated as the boundary for the statutory period entitling defendants to title by acquiescence, and whether defendants are entitled to title based on the doctrine of adverse possession.

Reversed and remanded. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

/s/ Patrick M. Meter